No. 14,898

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIE EARL FRAZIER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under Sections 1291 and 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted on February 11, 1954 in five counts for a violation of the narcotic laws of the United States together with Theodore Frazier, Evelyn Dyer and Emma Crawford. Appellant was charged in the fifth count of the indictment with selling 85 grains of heroin, in the sixth count with concealing 85 grains of heroin, in the ninth count with selling 48

grains of heroin, in the tenth count with concealing 48 grains of heroin and in the eleventh count with conspiracy to sell and conceal heroin. Appellant was tried by a jury before United States District Judge George V. Harris of the Northern District of California, and was convicted on all of the counts in which he was named in the indictment. On April 16, 1954 appellant was sentenced to four 5-year terms to run concurrently on Counts 5, 6, 9 and 10 of the indictment and in the eleventh count of the indictment to a 5-year term to run consecutively to the term imposed under the other four counts of the indictment.

No request for an entrapment instruction is contained in the record on appeal although all instructions refused are so included. No appeal was taken from the judgment of conviction.

On July 21, 1955 appellant moved to vacate his sentence pursuant to Section 2255 of Title 28 United States Code. In his petition appellant made four contentions: (1) that he was entrapped, (2) that he was convicted by the knowing use of perjured testimony, (3) that he was denied a fair trial, and (4) that the sentencing court had no jurisdiction.

In support of his first contention appellant apparently alleges that he had no desire to violate the narcotic laws and was persuaded to do so by one Marjorie Gray. In support of his second contention, that he was convicted by the use of perjured testimony, appellant alleges that Miss Gray testified that she had not received any money from Agent Perry for her personal use nor was promised a reward. He further

alleges that this perjury was knowing because following a visit by the United States Attorney and the Agent during a recess of the trial, Miss Gray changed her testimony and agreed that she had received money for her personal use and was promised a reward. In support of Contention No. 3 appellant alleges that the Agent and the United States Attorney talked to Miss Gray contrary to the orders of the trial judge. Contention No. 4 was merely a repetition of Contentions Nos. 2 and 3.

On August 5, 1955 Judge Harris denied appellant's motion to vacate and set aside sentence. Appeal was then made to this Court.

QUESTIONS PRESENTED.

1. Can entrapment be urged in a collateral attack upon a judgment of conviction?

2. Is there knowing use of perjured testimony when after a witness tells an incorrect story she changes her testimony to correspond to the facts?

ARGUMENT.

I. ENTRAPMENT CANNOT BE URGED ON COLLATERAL ATTACK.

Appellant did not appeal from the judgment of conviction in this case. The proceeding here is merely a collateral attack on the judgment. Appellant does not argue that a question of entrapment was requested and refused. He merely claims that he was entrapped

and is entitled to his release. As this Court said in *Hastings v. United States* (9th Cir. 1950), 184 F.2d 939, "Prisoners adjudged guilty of crime should understand that 28 U.S.C.A., Section 2255, does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them."

Entrapment is a defense which should be urged to the jury. It is not a claim which can be urged on collateral attack of a judgment. See *United States v. Spadafora, infra,* at 142.

II. THERE WAS NO KNOWING USE OF PERJURED TESTIMONY.

In the instant case appellant does not allege that the United States Attorney allowed the use of perjured testimony. His claim is that the witness first perjured herself and then was induced by the United States Attorney to correct her story.

A defendant has the burden of showing that testimony alleged to be perjured is material. *Cobb v. Hunter* (10th Cir. 1948), 167 F.2d 888; *United States v. Spadafora* (7th Cir. 1952), 200 F.2d 140, 142. Here the alleged perjured testimony involves no more than a denial of impeaching material. The testimony alleged to be perjured does not go to the guilt of the defendant but merely to the bias of the witness.

It could not be urged as grounds for a new trial, if discovered. Merely impeaching evidence is insufficient in such a motion. *Wagner v. United States* (9th Cir. 1941), 118 F.2d 801; *Balestreri v. United States* (9th Cir. 1955), 224 F.2d 915, 917; *Gage v. United States* (9th Cir. 1948), 167 F.2d 122. The same rule applies when merely impeaching matter is urged on collateral attack.

Here, however, the amazing part in appellant's claim is not that this testimony was allowed to stand but that the United States Attorney caused the witness to change her testimony to correspond with that which appellant claims is the true fact. When a United States Attorney discovers that a witness perjures himself or herself, there is no clearer duty than that this matter be immediately brought to the attention of the jury. This the United States Attorney did here. Nothing more is required.

CONCLUSION.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
February 13, 1956.

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